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No. 04-1157

Supreme Court, U.S.
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In The Supreme Court of the United States

STEVEN A. ODOM, MARK GERGEL, HENSLEY E. WEST, MARTIN D. KIDDER, STEPHEN J. CLEARMAN,

Petitioners,

v.

PEDRO YANG, CAROL JACKSON, PETER S. KELSCH, ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED; JAMES BARBERIAN, JOSEPH KINOSIAN, KAREN KINOSIAN, JASON THOMPSON, RAYMOND T. CRUMP,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does *American Pipe* tolling properly apply to permit a second class action that asserts claims that had been denied class certification in a prior action solely because of the individual deficiencies of different class representatives?

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INTRODUCTION

In the decision below, the Third Circuit held that class claims of certain subclasses were tolled under the rule adopted by this Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). According to the court below, these class claims could be timely asserted by class representatives where an earlier class action, which had been brought by other class representatives and asserted the same claims, had been denied class certification solely because of Rule 23 deficiencies of the individual class representatives. On the other hand, the court below also held that other class claims asserted on behalf of another subclass in the earlier class action could not be tolled where class certification had been denied by the prior court because the claims were not appropriate for class action treatment. The distinction made by the court below is important because when denial of class certification is based on the deficiency of a particular class representative, no ruling of any kind has been made as to claims of absent class members. However, when denial of class certification is based on a class-wide defect, such as a lack of numerosity or commonality, a ruling has been made that the class claims are not appropriate for class action treatment, regardless of who the proposed representative is.

In seeking *certiorari*, Petitioners (Defendants below) attempt to blur this critical distinction by stating, incorrectly, that the Third Circuit's ruling would allow any putative class member to "relitigate *the propriety* of class certification" (Pet. 2; emphasis added) and by incorrectly contending that the Third Circuit is in conflict with many other circuits. However, in each of the other circuit court cases that Petitioners cite, class certification was denied

because of a defect in the class itself, not because of any deficiency of the class representative. *See Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998) (class treatment inappropriate because individual issues predominate); *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988) (class inappropriate because no common issues); *Robbin v. Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987) (commonality not met); *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987) (class inappropriate because of unmanageability); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985) (common issues did not predominate). The Third Circuit's decision does not conflict with any of these decisions.

More recently, in *McKowan Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380 (3d Cir.), *cert. denied sub nom. Arthur Andersen, LLP v. Berger*, 537 U.S. 1088 (2002), the Third Circuit held that *American Pipe* tolling allowed an absent class member to intervene and continue to enforce class claims where class certification had been denied solely because of a deficiency of the previous class representative. This Court denied defendants' petition for *certiorari*. The argument that there is a supposed split in the circuits is no more compelling now than when the Third Circuit decided the *McKowan* case.

The sole authority on which Petitioners rely that appears to be in conflict with the other circuit courts is the Eleventh Circuit's decision in *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994). However, the continued viability of that decision is doubtful at best. As discussed below, the *Griffin* decision had unusual facts, did not offer any reasoned analysis, and relied entirely on decisions of courts of appeals for the Second, Fifth, Sixth, and Ninth Circuits, which are all consistent with the Third Circuit's

decision. Indeed, the Ninth Circuit's later decision in *Catholic Social Services, Inc. v. Immigration & Naturalization Serv.*, 232 F.3d 1139 (9th Cir. 2000) (en banc), demonstrates that the Ninth Circuit's position is consistent with that of the Third Circuit. If the Eleventh Circuit decided the issue today, it is far from certain that it would refuse to adopt the Third Circuit's approach. Thus, there is no clear split of authority among the circuits that would require this Court's intervention.

STATEMENT OF THE CASE

This action was brought in the District of New Jersey on December 17, 2002, by Pedro Yang, Carol Jackson, and Peter S. Kelsch against certain former officers and directors of World Access, Inc. ("WAXS") as a class action alleging claims under Sections 10(b) and 20(a) of the 1934 Act and SEC Rule 10b-5 promulgated thereunder, and Sections 11 and 15 of the 1933 Act. The complaint alleges three separate subclasses on behalf of (i) those who purchased securities of WAXS in the open market during the period April 29, 1997, through February 11, 1999 (the "Class Period"; the "Open-Market subclass"); (ii) those who acquired securities of WAXS in the merger of Telco Systems Inc. ("Telco") into WAXS (the "Telco subclass"); or (iii) those who acquired securities of WAXS in the merger of NACT Telecommunications Inc. ("NACT") into WAXS (the "NACT subclass").

Plaintiffs allege that Defendants issued materially false and misleading statements and omitted to disclose material information concerning the products, revenues, earnings, inventory, and sales practices of WAXS.

The Course of Proceedings

On January 7, 1999, shortly after Defendants' and WAXS's first partial disclosure of their fraud was revealed, the first of twenty-two class action complaints was filed in the Northern District of Georgia. After consolidation of the actions, filing of a Consolidated Amended Complaint (the "Georgia Complaint"), and denial of Defendants' motion to dismiss, Defendants agreed to stipulate to class certification. However, the district court rejected the stipulation and ordered Plaintiffs to renew their motion for class certification.

The district court denied the renewed class certification motion with prejudice, even though Defendants had not opposed the motion. Plaintiffs' motion for reconsideration, as well as Plaintiffs' petition for interlocutory appeal under Fed. R. Civ. P. 23(f), were denied. Following the denial of class certification, the Georgia Action continued on behalf of five individual plaintiffs, each of whom had significant losses. Ultimately, only two individual plaintiffs decided to maintain individual actions. After the Georgia Court granted summary judgment against the two individual plaintiffs and in favor of Defendants and while the appeal of that order was pending, both individual plaintiffs settled with the Defendants.

On December 17, 2002, plaintiffs Pedro Yang, Carol Jackson, and Peter S. Kelsch (who were not named plaintiffs in the Georgia Action) filed the present action in the District of New Jersey. By order dated, March 18, 2003, the New Jersey district court consolidated this action with a subsequently filed and substantially identical action and appointed Jason Thompson and Raymond T. Crump as lead plaintiffs. Neither Mr. Thompson nor Mr. Crump had

been a named plaintiff or proposed class representative in the Georgia Action.

On or about March 13, 2003, Defendants moved to dismiss the Complaint arguing, among other things, that the action was barred because the statute of limitations had expired. By Decision and Order dated June 2, 2003, the district court granted Defendants' motion to dismiss.

The Decision of the Third Circuit

The Third Circuit reversed in part and affirmed in part. Specifically, the court of appeals held that:

> *American Pipe* tolling allows litigants whose individual lawsuits would have been timely with the benefit of tolling due to an earlier class action to aggregate their claims in a substantively identical class suit so long as the denial of certification in the earlier action was based solely on Rule 23 deficiencies of the putative representative.

The court also held, however, that "*American Pipe* tolling does not apply to later class actions where a substantially identical class suit was denied certification due to a Rule 23 defect in the class itself."

Significantly, although the court of appeals described "three approaches" that the courts of appeals have used related to the tolling issue, it found that none of the other decisions of the other courts of appeals (all of which Petitioners cite in the Petition), with the exception of the Eleventh Circuit's decision in *Griffin*, conflicts with either its prior decision in *McKowan* or its ultimate holding here. Thus, in every one of those cases where *American Pipe* tolling was found not to apply, class certification had been

previously denied due to a Rule 23 defect in the class itself.

Applying its holding to the facts, the Third Circuit determined that the Georgia district court had previously denied class certification as to two of the three subclasses (Telco and Open-Market) based on the inadequacy of the proposed class representatives – not because those subclasses were inappropriate for class treatment.[1] As to the third subclass (NACT), the Court determined that the Georgia District Court had denied class certification based upon a lack of numerosity. Thus, that particular subclass was not appropriate for class treatment.

Judge Alito concurred with the holding of the court's decision as to the Telco and NACT subclasses, but disagreed as to the Open-Market subclass solely because he believed, on the facts of the case, that the Open-Market subclass had failed class certification in the prior action because it was not appropriate for class-wide treatment and not because of any deficiency of the class representative.

REASONS FOR DENYING THE PETITION

A. There Is No Genuine Conflict in the Circuits Over the Application of the Tolling Rule

Petitioners' primary argument for granting the Writ is that the circuits are deeply split over the tolling issue.

[1] The two proposed class representatives in the Georgia Action that were found to be inadequate were William B. Tanner, on behalf of the Open-Market subclass, and John Brothers, on behalf of the Telco subclass. Neither Mr. Tanner nor Mr. Brothers is a named plaintiff or proposed class representative in the New Jersey Action.

However, close examination of the cases Petitioners cite reveals that, with the possible exception of *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994) (discussed below), none is inconsistent with the Third Circuit's holding in this case.

In each of the cases Petitioners cite, except *Griffin*, the circuit courts affirmed a district court's holding that the action was not appropriately treated as a class action. These holdings are consistent with that part of the Third Circuit's decision here affirming dismissal of the NACT sub-class because the district court had found that a lack of numerosity meant that those claims were inappropriate for class treatment. The holdings of the cases Petitioners cite are also not inconsistent with that part of the Third Circuit's decision that found that tolling was appropriate for the Telco and Open-Market classes because the Georgia district court had not suggested that those claims were inappropriate for class treatment, but had merely determined that the two proposed class representatives in Georgia were deficient.

Thus, in *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985), the Fifth Circuit affirmed the district court's order denying certification because the court agreed that common issues did not predominate and class status would not be superior to individual claims. The Fifth Circuit held that once the first class certification petition was denied *because of a defect in the underlying class* there could be no piggybacking "for any subsequent petitions involving the same class." 765 F.2d at 1351. In *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987), the Second Circuit affirmed the district court's holding of a "definitive determination of inappropriateness of class certification" because the alleged class of futures

contracts purchasers was unmanageable, and a second attempt at class status that simply repeated the same claims could not cure the problem of unmanageability. 827 F.2d at 879. In *Robbin v. Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987), while the Ninth Circuit rejected without discussion a subsequent class action, *id.* at 215, the record shows that class certification had been denied in the original lawsuit because the district court determined that the commonality requirement was not met, thus making class action treatment inappropriate. *See Schlesinger Inv. P'ship v. Fluor Corp.*, No. 81 Civ. 2852, 1983 U.S. Dist. LEXIS 15329, at *13-14 (S.D.N.Y. July 14, 1983).

Also, in *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988), the district court had denied class certification in a Title VII case because, among other things, plaintiffs had not "established a question sufficiently common to all proposed class members to meet the requirements of Fed.R.Civ.P. 23(a)(2)." *See Brown v. Orr*, 99 F.R.D. 524, 527 (S.D. Ohio 1983). The Sixth Circuit affirmed the district court's dismissal of the class claims because the named plaintiffs had failed to exhaust administrative remedies within the required time period, and equitable tolling could not be applied to extend the time in which individual plaintiffs could file administrative complaints. The Sixth Circuit, without specifically referring to the grounds for denial of class certification by the district court (*i.e.*, a defect in the class), further held there could be no tolling for class claims, simply citing *Korwek*, *Salazar* and *Robbin*, and quoting those courts' warnings against abuse by piggybacking and repetitive filings. 851 F.2d at 149. Finally, in *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998), the First Circuit affirmed the district court's holding that after four different tries by various proposed

class representatives, the underlying class as a whole was deficient because individual issues predominated over the common issues. 139 F.3d at 7 and 8 n.4.

As the court below correctly recognized, *Catholic Social Services, Inc. v. Immigration & Naturalization Serv.*, 232 F.3d 1139 (9th Cir. 2000) (en banc), also supports the Third Circuit's decision below. In *Catholic Social Services*, the district court first properly certified a class, but after a change in the law deprived the named plaintiffs of a jurisdictional basis for their claims, a second class action by different class representatives was filed and also was certified. The majority held that the filing of the first class action tolled the limitations period for the later-filed class action because the second class action *did not seek to relitigate the deficiency that caused the earlier denial of class certification,* thereby distinguishing the case before it from the court's earlier decision in *Robbin*. Thus, *Robbin* and *Catholic Social Services* taken together support the distinction made by the Third Circuit as to the application of the tolling doctrine.

In *McKowan Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380 (3d Cir.), *cert. denied sub nom. Arthur Andersen, LLP v. Berger*, 537 U.S. 1088 (2002), the Third Circuit held that *American Pipe* tolling allowed an absent class member to intervene and continue to enforce class claims where class certification had been denied solely because of a deficiency of the previous class representative. This Court denied defendants' petition for *certiorari*. The argument that there is a split in the circuits is no more compelling now than when the Third Circuit decided *McKowan*. Petitioners rely heavily on *Griffin* to create a split in the circuits. However, *Griffin*, which was decided eleven years ago, is atypical in that a class was initially certified, but later, a

change in the law deprived the named plaintiffs of standing. In affirming the decertification of the class, the Eleventh Circuit described the more than fifteen-year history of the case, where more than sixty different named plaintiffs repeatedly attempted to assert a wide variety of uncohesive individual and class claims. *See* 17 F.3d at 357-59. Without analysis, *Griffin* cited *Andrews*, *Korwek*, *Salazar*, and *Robbin* and held that "Plaintiffs may not piggyback one class action onto another and thus toll the statute of limitations indefinitely." As shown above, all of the decisions relied upon in *Griffin* are actually consistent with the Third Circuit's decision. Moreover, as the Third Circuit concluded, the Ninth Circuit's subsequent decision in *Catholic Social Services* removes any doubt that the Ninth Circuit's position is consistent with that of the Third Circuit. Based on the unusual circumstances in *Griffin* and its lack of analysis and consideration of the distinction made by the Third Circuit, it is hardly a foregone conclusion that the Eleventh Circuit would adhere to its decision in *Griffin*, to the extent that it would preclude the application of tolling in circumstances where class certification had been denied in an earlier action based solely on the deficiencies of other putative representatives.[2]

[2] After class certification was denied in the Georgia Action, Plaintiffs here chose to file a new case in the District of New Jersey, where there are both jurisdiction and venue, and where *McKowan* controls, rather than taking on the added burden of challenging the continuing validity of *Griffin* in the Eleventh Circuit.

B. The Third Circuit's Decision Is Correct and Consistent with this Court's Rationale for Adopting the Tolling Rule

In adopting the tolling rule in *American Pipe* and *Crown, Cork & Seal*, this Court held that tolling is required to eliminate any necessity or incentive for absent class members to pursue their individual claims by intervening or filing their own complaint prior to a determination of whether the case should proceed as a class action.

In *American Pipe*, the district court had denied class certification because of a lack of numerosity. 414 U.S. at 543. After the entry of that order, the district court denied the motions of various entities that were within the class definition to intervene as individual plaintiffs. *Id.* at 543-44. The Ninth Circuit reversed. *See id.* at 545. Affirming the judgment of the Ninth Circuit, the Court adopted a rule tolling the statute of limitations for these entities because it was "convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations *as to all asserted members of the class* who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 553-54 (emphasis supplied). "A contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is the principal purpose of the procedure." *Id.* at 553.

In *Crown, Cork & Seal*, the district court denied class certification for, among other reasons, a lack of numerosity. 462 U.S. at 348. Rather than intervene, as in *American Pipe*, a plaintiff who was within the class definition filed a

separate, individual action. The district court granted summary judgment against the plaintiff based on the expiration of the statute of limitations and the Fourth Circuit reversed, based on *American Pipe* tolling. Affirming the Fourth Circuit decision, the Court had the opportunity to limit the scope of the tolling rule in *Crown, Cork & Seal Co.*, 462 U.S. at 350-51, but, instead, concluded that "[w]hile *American Pipe* concerned only intervenors," the rule "is not to be read so narrowly" that it would result in the needless multiplicity of actions that the Court created the tolling rule to avoid. The Court concluded that the tolling rule must be read to eliminate "every incentive to file a separate action prior to the expiration of [each absent class member's] own period of limitation." *Id.* at 349.

The severe limitation on the tolling rule that Petitioners propose – that denial of class certification *for any reason* will prohibit class tolling – would create a strong incentive for class members to file separate duplicative class actions or to intervene as class representatives in the pending action *prior* to the class certification decision in order to protect their ability to pursue their claims on a class basis. Petitioners' argument should be rejected as inimical to the Court's basis for creating the tolling rule.

Petitioners' proposed limitation is also seriously flawed because it ignores the realities of the well-recognized necessity for class actions. This Court has consistently held that Rule 23 has an important remedial purpose and is necessary to enable claims too small to be pursued separately to be joined together. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 616 (1997) ("[The drafters of Rule 23] had dominantly in mind vindication of 'the rights of groups of people who individually would be without

effective strength to bring their opponents into court at all.'" (citation omitted)); *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."). As the Third Circuit emphasized in *McKowan*, "[c]lass actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, 'since the effectiveness of the securities laws may depend in large measure on the application of the class action device.'" 295 F.3d at 384 (quoting *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985) (citations omitted)). Under Petitioners' proposed rule, denial of class certification because of the deficiency of one proposed class representative would be the equivalent of dismissal (but with no decision as to whether the case is appropriate for class treatment and no hearing on the merits of the case) as to most class members for whom litigating on an individual basis would not be economically feasible.

C. Petitioners' Arguments that the Issues Presented Are Recurring and Important to the Fair Administration of Justice Are Incorrect

Petitioners argue that "[t]he recurring nature of the question presented is vividly illustrated by the numerous opinions of courts of appeals and district courts that have grappled with the issue." (Pet. 19.) Instead of citing to those supposedly "numerous" cases, Petitioners merely state that there are thousands of class actions pending and more than 3000 new class actions filed each year. Rather than supporting Petitioners' argument, these

numbers are a testament to how rarely the tolling issues presented here are actually litigated. Significantly, the age of the handful of circuit court cases that Petitioners rely upon – going back to 1985 – also indicates that the issue is not often litigated.

In this same vein, Petitioners argue that the Third Circuit's holding would allow "successive, replicative, 'stacking'" of class claims. (Pet. 20.) However, the holding here is exactly the opposite. The Third Circuit, here, affirmed dismissal of the NACT subclass precisely because it would not allow the relitigation in New Jersey of the Georgia Court's finding that the NACT subclass lacked numerosity. On the other hand, the Third Circuit recognized that the holdings by the Georgia Court concerning the Open-Market and Telco subclasses only implicated deficiencies of the two particular proposed class representatives in that case (William B. Tanner and John Brothers); that the Georgia Court had not determined whether the Open-Market and Telco claims were or were not appropriate for class treatment; and that Plaintiffs in the New Jersey Action were not seeking to relitigate the appropriateness of Tanner and Brothers to be class representatives. Neither of these two people is, in fact, a named plaintiff, lead plaintiff, or proposed class representative in the New Jersey Action.

Similarly, Petitioners' concern that the Third Circuit's holding is "administratively unworkable" is incorrect. The Third Circuit's rule is simply that a district court should look within the four corners of the prior class certification denial to see whether the denial is based *solely* on the inappropriateness of the proposed class representative or

whether the claim is determined to be inappropriate for class treatment.[3] While Petitioners are certainly correct that in some cases there may be no "bright line between the test for an adequate representative and the test for the propriety of class certification" (Pet. 22-23), even in Petitioners' example of *Amchem*, it was, according to Petitioners, "clear that common issues did not predominate." (*Id.*) Thus, under the Third Circuit's ruling here, tolling would not apply in that situation where there was a class-wide deficiency.

Petitioners provide one, and only one, choice "to cure the inadequacy of a class representative in those case where the inadequacy is based on the individual representative's deficiencies rather than deficiencies within the class as a whole." (Pet. 22.) While Petitioners' suggestion of a court's permitting intervention of a new proposed class representative is certainly one possible choice, it is not the only choice. In *Crown, Cork & Seal*, where the class had been decertified based, in part, on a lack of numerosity, this Court made it clear that limiting a class member's choice to intervention would cause many of the same inefficiencies recognized in *American Pipe* (462 U.S. at 350), that a class member might prefer to bring an individual suit rather than intervene (*id.*), and that intervention might be denied by the district court for reasons unrelated to the merits of the claim (*id.*). Petitioners' cry of "forum shopping" was also considered and rejected in

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[3] While Judge Alito may have disagreed with the method of making this determination as applied to the facts of this case, he did not disagree with the basic holding that tolling should apply where denial of class certification was based solely on the inappropriateness of the proposed class representative.

Crown, Cork & Seal where the Court explained that a class member might have legitimate reasons to prefer to bring a new suit in a different forum. *Id.* Moreover, while plaintiffs do routinely commence suits in forums that they think will be advantageous, defendants just as routinely remove or seek to transfer those cases to forums that they think will be advantageous. In addition, while Petitioners may wish to have a single court make the Rule 23 inquiry (Pet. 22), the *Crown, Cork & Seal* Court rejected this same argument, ruling that "[o]ther avenues exist by which the burdens of multiple lawsuits may be avoided." *Id.* at 353.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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Respectfully submitted,

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